Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WILLIAM H.JOHNSON, and
LINDA L.JOHNSON,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI
Separate Appendix

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CONSTITUTION
OF THE
UNITED STATES OF AMERICA
AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of Was or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation. (emphasis added)

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5 U.S.C. Section 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding from the public or limiting the availability of records to the public.

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5 U.S.C. Section 552 (A) (4) (B)

On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated. or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

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18 U.S.C. Section 241. Conspiracy against rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same: or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured - -

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both: and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. Section 2071. Concealment, removal, or mutilation generally

.(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

.(b) Whoever, having the custody of any such record, proceeding, map, book, document, paper, or other thing, willfully and unlawfully conceals, removes, mutilates, obliterates, falsifies, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than three years, or both; and shall forfeit his office and be disqualified from holding any office under the United States.

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26 U.S.C. Section 6212 Notice of deficiency.

.**(a) In general.** If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

.**(b) (2) Joint income tax return.** In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single notice, except that if the Secretary has been notified by either spouse

that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

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26 U.S.C. Section 6213. Restrictions applicable to deficiencies; petition to Tax Court.

.**(a) Time for filing petition and restriction on assessment.** In part, within 90 days after the notice of deficiency authorized in section 6212 is mailed, the taxpayer may file a petition with the Tax Court for redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day period, nor if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

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26 U.S.C. Section 6501. Limitations on assessment and collection.

.**(a) General rule-** Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed, etc.

26 U.S.C. Section 7422 Civil actions for refund.

.**(a) No suit prior to filing claim for refund.** No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been filed with the Secretary, according to the provisions of law in regard, and the regulations of the Secretary established in pursuance thereof.

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26 U.S.C. Section 7433 Civil damages for certain unauthorized collection actions.

.**(a) In general.** If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

.**(d) Limitations. (1) Requirement that administrative remedies be exhausted.** A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

.**(2) Mitigation of damages.** The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which could have reasonable been mitigated by the plaintiff.

.**(3) Period for bringing action.** Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and brought only within 2 years after the date the right of action accrues.

Title 28
Judicial Administration

Chapter I – DEPARTMENT OF JUSTICE
Part 50 – STATEMENTS OF Policy
Order No. 530-73
Policies With Regard to the Defense of Civil Actions Under the Freedom Of Information Act and the Functions of the Freedom of Information Committee

Under and by virtue of the authority vested in me by section 509 of Title 28 of the United States Code, Part 50 of Title 28 of the Code of Federal Regulations is amended by adding at the end thereof the following new section:

Section 50.9 Policies with regard to the defense of civil actions under the Freedom of Information Act and the functions of the Freedom of Information Committee.

.(a) No civil action against a federal agency under the Freedom of Information Act, 5 U.S.C. 552, shall be defended by the Civil Division, the Tax Division or any other part of the Department of Justice unless the Department's Freedom of Information Committee has been consulted by the agency, This does not preclude the defense of a premature suit, brought before the agency's final denial of the materials at issue, provided that the agency as promptly as possible upon the filing of the suit brings the matter before the Committee.

.(b) The Freedom of information Committee referred to in this section is the committee of lawyers in the Office of Legal Counsel and in the Civil Division which was first established December 8, 1969. The functions and current membership of the Committee are noted in a memorandum from the Attorney General to the heads of all agencies issued at the time of the adoption of this section.

.(c) The Committee is instructed to make every possible effort to advance the objective of the fullest responsible disclosure. to this end, in connection with its consultations with agencies that propose to issue final denials under the Act, the committee shall , in addition to advising the agency with respect to the legal issues, invite the attention of the agency to the range of public policies reflected in the Act, including the central policy of the fullest responsible disclosure. The Committee may also request assistance and make studies and recommendations to carry out the intent of this paragraph.

Dated: July 11, 1973.

Elliot L. Richardson,
Attorney General.

[FR Doc.73-14649 Filed 7-17-73; 8:45 am]

28 U.S.C. Section 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

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28 U.S.C. Section 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably be questioned.

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28 U.S.C. Section 1346. United states as defendant

.(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

.(1) Any civil action against the United States for the recovery of any internal- revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

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26 C.F.R. Section 301.7433-1 Civil cause of action for certain unauthorized collection actions.

.**(g) Period of limitations – (1) Time for filing.** A civil action under paragraph (a) of this section must be brought in federal district court within 2 years after the date the cause of action accrues.

.**(2) Right of action accrues.** A cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

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26 C.F.R. Section 601.105 THIRTY – day letters –

In an unagreed case, the district director sends to the taxpayer a preliminary or "30-day letter" if any one of the last three determinations is made (except full allowance of a claim in respect of any tax). The 30-day letter is a form letter which states the determination proposed to be made. It is accompanied by a copy of the examiner's report explaining the basis of the Of the proposed determination.

taxpayer that if the taxpayer concurs in the recommendation, he or she indicate agreement by executing and returning a waiver or acceptance. The preliminary letter also informs the taxpayer of appeal rights available if he or she disagrees with the proposed determination. If the taxpayer does not respond to the letter within 30 days, a statutory notice of deficiency will be issued or other appropriate action taken, such as the issuance of a notice of adjustment, the denial of a claim in income, profits, estate, and gift tax cases, or an appropriate adjustment of the tax liability or denial of a claim in excise and employment tax cases.

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26 C.F.R. Section 601.106. Appeals functions.

.(f)(1) Rule I. An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without **due process of law,** in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers.

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26 C.F.R. Section 601.702

.(b)(1) The IRS is required under 5 U.S.C. Section 552(a)(2) to make available for public inspection and copying

.(iii) its administrative staff manuals that affect a member of the public.

.(b)(3) Public reading rooms

Each regional office of the IRS will provide a reading room or reading area where the matters described in paragraph (b)(1)(I) through (iii) of this section which are required by such paragraph to be made available for public inspection will be made available to the public for inspection and copying.

.(b)(3)(iv) Copies of the requested material may also be mailed to such person by such office upon request. If requested reading room material is not readily available for inspection at the office where the request is made, then the request will be referred by such office to one of the reading rooms of the IRS.

.(c)(1) The IRS will make reasonable described records available to a person making a request for records which conforms in every respect with the rules and procedures set forth in this subpart. This paragraph applies only to records in being which are in the possession or control of the IRS.

.(c)(2)(I) The request for such record will immediately be transferred to the appropriate constituent unit and the requester notified to that effect. Where the request is for a record which is determined not to be in the possession or control of any constituent unit of the Dept. of the Treasury, the requester will be advised and the request will be returned to the requester.

.(c)(3)(ix) However, every effort will be made to comply with the requests as written.

26 C.F.R. Section 601.702 cont.

.(c)(4)(i)(A) The requester shall be afforded an opportunity to refine his request. Such opportunity may, where desirable, involve a conference with knowledgeable IRS personnel.

.(c)(4)(i)(A) The reasonable description requirement will not be used by officers or employees of the IRS as a device for improper withholding records from the public.

.(c)(4)(i)(B) The IRS will make every reasonable effort to comply fully with all requests for access to records subject only to any applicable exemption.

.(c)(7)(i) The initial determination will be made and notification thereof mailed within 10 days after the date of receipt of the request.

.(c)(7) Denial of request.

.(iii) The person making the request will be notified by mail and advise the person making the request of the right to appeal to the Commissioner.

.(c)(8) Administrative appeal.

The Commissioner or his/her delegate will acknowledge receipt of the appeal and advise the requester of the date of receipt and when a response is due in accordance with this paragraph.

.(c)(12) Preservation of records.

Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal or lawsuit under 5 U.S.C. Section 552. Re: Title 44 U.S.C.

Section 1(15)59.26 Destruction of records.

.**(a)** Income Tax Returns by Individuals
.**(b)** Description of records and disposition authorizations
.**(c)** These records include the Forms 1040 series, with related schedules, correspondence, audit reports, workpapers and other documents attached to the return or considered a part of the administrative file, regardless of whether the documents are physically with the return or maintained in an attachment file.
.**(d)(2)** Returns in penalty file. Returns on which a penalty of 50% or more has been assessed and cases for which Criminal Investigation Division has requested longer retention.
. **(e)(2)(a)** RETIRE to the federal Records Center July 1 through September 30 following the year in which returns were numbered in penalty or supplemental series.
.**(f)(2)(b)** DESTROY six years and nine months after the end of the calendar year in which case closed.

Section 3(15)(185)0

IRP Substitute for Returns (SFR) Program, **103 pages**

Section 3(15)(185)(12).1 Notice Issuance Criteria

.**(1)** Statutory Notice of Deficiency procedures will be employed when:
.**(a)** a response to Letter 1862 (C) is not received within 45(60) days (75 days for APO/FOP addresses and those addresses outside the U.S.);

.**(b)** an undelivered response that cannot be reissued to a new address after using procedures in **3(15)(185)(10).2;**

.**(c)** a remailed (undelivered that obtains a new address) Letter 1862 (C) package which is not responded to within 45(60) days (75 days for APO/FPO addresses and those addresses outside the U.S.);

.**(d)** a remailed (undelivered) Letter 1862(C) package is returned as being undeliverable to a new address and all addresses found have been tried;

.(e) other correspondence issued in an attempt to resolve missing data, etc., according to instructions in **3(15)(185)(10)** is not responded to within 45 days (60 days for APO/FPO addresses and those outside the U.S.).

.**(2)** Statutory Notices of Deficiency will only be issued when the

(entire line of print redacted)

according to instructions above.

3(15)(185)(13).4 Undelivered Statutory Notices

.**(1)** When a Statutory Notice of Deficiency is returned by the Post Office as undeliverable, first check IDRS to see if a change of address has occurred due to the posting of a subsequent year's tax return or other activity.

.**(2)** If a new address is found, prepare a new Statutory Notice of Deficiency, using the new address following the instructions in **3(15)(185)(12).2** and **3(15)(185)(12).3** above.

.**(a)** When remailing a statutory notice to a new address, the address used must be noted in the case file.

.**(b)** Place the original undelivered statutory notice in the case file.

.**(3)** If a new address is not found by (1) above, check the case file to see if any other address (which has not been used already) exists. Follow undeliverable instructions in **3(15)(185)(10).2** above whenever possible (i.e., the Letter 1862(C) was not responded to nor returned undeliverable).

.**(a)** If a new address is found, prepare a new statutory notice. Follow **3(15)(185)(12).2** and **3(15)(185)(12).3** Instructions.

.**(b)** If a new address is found, the assessment will be made after the Statutory Notice of Deficiency suspense period has expired.

.**(4)** Whenever a new notice is issued, make sure to update the IDRS control base. Also note the case file.

Section 4243.2 Undeliverable Mail

.**(1)** When Examination employees issue notices or letters concerning examinations to addresses that are no longer valid, no one benefits. The taxpayer is not being treated fairly, and in many cases the undeliverable mail may generate an uncollectible account or an audit reconsideration.

.**(2)** Each time correspondence is returned undeliverable a determination as to the taxpayer's correct address is to be made.

.**(3)** Research for the correct address will consider inhouse address information before requesting outside locator services. Documentation of the research is required and Form 8572 is available for this documentation.

.**(4)** Rev. Proc. 90-18 provides that the taxpayer's address for mailing a notice of deficiency is the last known address. Etc.

Disclosure of Official Information Handbook
Page 1272-151

Section (13)34 Making Transfers

.**(1)** Cases will be transferred to the office of proper jurisdiction whenever the request contains some indication that access to records located elsewhere is desired or when research suggests that records could be located in another office.
.**(2)** A Disclosure Officer's independent knowledge of IRS institutional practices may also indicate that, although no responsive records within his or her office, there are responsive records in another office. In such a case, the request will be transferred to that office.

ADP and IDRS Information 1987, Document 6209

Document 6209 is provided as a handy reference guide only. More detailed and current information can be found in the appropriate Internal Revenue Manuals or ADP Handbooks. Limited resources and book format make on-going maintenance of this document prohibitive.

Providing Document 6209 in bound format is the most economical method for accommodating our needs. The initial cost of changing from bound book to loose-leaf would be prohibitive. Additionally, the costs incurred in subsequent years would also be greater than in bound format.

Document 6209 contains **material of a sensitive nature and therefore requires maximum safeguards.** (continued on next page)

Document 6209, continued. (390 pages)

In addition, security dictates that copies of the Document 6209 carried by Revenue Officers and others should not come apart easily as potential loss would compromise **" Official Use Only"** material.

OCHOA v. HERNANDEZ, (1913), 230 U.S. at 139: Even if the commanding officer in territory occupied by military forces of the United States has all legislative power as to such territory possessed by Congress, he is still subject, as Congress is, to the provisions of the Fifth Amendment and cannot by military orders deprive persons of their property without due process of law.

To shorten the period for acquisition of title by prescription and give the order a retroactive effect so that the period has elapsed at the time the order is made without giving those who have interests in the property an opportunity to be heard and saving no existing rights, amounts to taking property without due process of law.

Ochoa, at 161: Without the guaranty of "due process" the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that chapter (Coke, 2 Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term ""due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.

Garfield v. United States, (1908) 211 U.S. 249, at 262: In the extended discussion which has been upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

The right to be heard before property is taken or

rights or privileges withdrawn, which have been previously legally awarded, is the essence of due process of law. It is unnecessary to recite the decisions in which this principal has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this Court.

Brandt v. Hickel, 427 F.2d 53 (1970(at 54: Due process clause requires that notice must be reasonably calculated to inform parties of administrative proceedings which may directly and adversely affect their legally protected interests.

Mathews v. Eldridge, 424 U.S. 319, at 333: This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principal basic to our society." The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." (citations omitted)

Bolling v. Sharpe, 347 U.S. 497 (1854): Though the Fifth Amendment does not contain an equal protection clause, as does the Fourteenth Amendment which applies only to the States, the concepts of equal protection and due process are not mutually exclusive. P. 499. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Although the Court has not assumed to define "liberty" with any great precision, that term is not

confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

Dent v. West Virginia, 129 U.S. 114, at 120: "The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions without any control or diminution save only by the law of the land."

From these authorities the conclusion is inevitable that the terms life, liberty and property, as used in the Constitution, were intended to comprehend **every right** known to the law, which might in any manner become the object of state oppression, and that a man's estate in his profession and the right to the enjoyment of his acquired reputation are as certainly included in the meaning of these terms as his lands and chattels.

Dent, at 121: It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecutation, is often of great value to the possessors, and cannot be arbitrarily taken from them , any more than their real or personal property can be thus taken.

U.S. v. Price, 383 U.S. 787, 800: The language of Section 241 is plain and unlimited. As we have

discussed, its language embraces **all** of the rights and privileges secured to citizens by **all** of the Constitution and **all** of the laws of the United States. *Price*, at 801: We think that the history leaves no doubt that, if we are to give Section 241 the scope that its origins dictate, we must accord it a sweep as broad as its language.

U.S. v. McDermott, 918 F.2d 319 at 325: As stated in *United States v. Guest*, 383 U.S. 745, decided on the same day as *Price*, "when Section 241 speaks of 'any right or privilege secured by the Constitution or laws of the United States,' it means precisely that." 383 U.S. at 753.

Walker v. U.S.,93 F.2d 383: The gist of the crime of conspiracy to injure citizens in the exercise of a right or privilege secured to them by Federal Constitution or laws is the unlawful conspiracy (Cr. Code, Section 19, 18 U.S.C.A. Section 51., *Walker*, at 385: In prosecution for conspiracy, much discretion is vested in trial court with reference to admissibility of evidence of circumstances, and ruling of trial court will ordinarily be sustained if testimony which is admitted tends in some degree to establish ultimate fact, or makes evidence intelligible (Cr. Code, Section 19, 18 U.S.C.A.. Section 51.

U.S. v. Purvis, 580 F.2d 853, at 854: Government must prove specific intent to deprive a citizen of constitutional rights to sustain a conviction under statute imposing criminal sanctions for conspiring against citizens. "Conspiracy" incorporates willfulness and specific intent, and intent to accomplish an object cannot be alleged more clearly than stating that parties conspired to accomplish it.

Luteran v. U.S., 93 F.2d 395,: Where proof of a conspiracy has been established, a relatively slight amount of evidence connecting accused therein is sufficient to sustain conviction. Participation in

formation of conspiracy is not essential to culpability, if after it is formed, accused aid or abetted it with understanding of its purpose. Evidence of conspiracy must disclose something further than participation in offense which is object of conspiracy at some stage of its execution, for there must be proof of an unlawful agreement, either express or implied. Where accused aided conspirators, knowing, in a general way, their purpose to brake the law, jury may infer that accused entered into express or implied agreement with them.

Wilkins v. U.S., 376 F.2d 552, at 553: In civil rights conspiracy indictment, not only must specific intent to interfere with federal right be alleged but it must be proven by evidence beyond reasonable doubt.

U.S. v. Morado, 454 F,2d 167: Statute prohibiting conspiracy against rights of citizens does not require that any overt act at all be shown.

U.S. v. Robinson, 503 F.2d 208: It is not necessary that all or more than one of the conspirators participate in a particular overt act of the conspiracy.

U.S. v. Skillman, 922 F.2d 1370: Once conspiracy is established, defendant must only have connection to link him with conspiracy; this slight connection may be demonstrated by proof of defendant's willful participation in illegal objective with intent to further some purpose of conspiracy.

U.S. v. Ellis, 595 F.2d 154, at 155: Proof of conspiracy may rest on indirect or circumstantial evidence; existence of conspiracy may be inferred from evidence of related facts and circumstance from which it appears, as a reasonable and logical inference, that the activities of the participants in the criminal venture could not have been carried on except as the result of a preconceived scheme or common understanding.; *Ellis* at 162: An act done in open defiance or reckless disregard of the Constitutional requirement which has been made specific and

definite, may be found to have been willfully within the meaning of the statute.

U.S. v. Redwine, 715 F.2d 315: Government need not establish that there existed formal agreement to conspire: circumstantial evidence and reasonable inferences drawn therefrom concerning the relationship of the parties, their overt acts, and totality of their conduct may serve as proof.

U.S. v. Callahan, 659 F.Supp. 80, at 84: Proof of violation of Section 241 requires a showing of an agreement with the specific intent to interfere with exercise of a federal right, and at least one overt act taken to accomplish the intent of the conspiracy. (citations omitted)

U.S. v. Anderson, 481 F.2d 685, at 697: An unlawful conspiracy is presumed to continue until its objective or purpose is achieved. (citations omitted)

U.S. v. Guillette, 547 F.2d 743, at 744: Defendant need not be a member of the conspiracy from its inception but may join later and incur liability for the conspiracy's unlawful act committed both before and after his adoption of the conspiracy.

Cartello v. U.S., 93 F.2d 412, at 415: A conspiracy is the gist of the offense, and that conspiracy must be proven beyond a reasonable doubt, either by direct or circumstantial evidence, or both. "But in conspiracy cases, the unlawful combination, confederacy, and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the corpus delicti charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained."

Devoe v. U.S., 103 F.2d 584, at 585: In conspiracy prosecution, trial court had discretion to admit evidence which even remotely tended to establish the

conspiracy charged.

U.S. v. Guzzino, 810 F.2d 687, at 688: Verdict based on circumstantial evidence must not rest solely on piling of inference upon inference, but neither should reviewing court view each bit of evidence in isolation Common sense is no substitute for evidence, but common sense should be used by jury to evaluate what reasonable may be inferred from circumstantial evidence. *Guzzino,* at 696: Direct evidence, however, although it may be considered more reliable, is by no means the only evidence from which a jury may find the necessary knowledge and intent. It has long been established that " the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." The "substantial evidence" necessary to prove a criminal conspiracy need not be proved by direct evidence as the common conspiratorial purpose and plan may be inferred from "a development and a collection of the circumstances." It is indeed a "rare case" where there is direct evidence to show the requisite knowledge and intent of coconspirators. (citations omitted)

Armstrong v. Manzo, 380 U.S. 545, at 549: We granted certiorari. 379 U.S. 816. The questions before us are whether failure to notify the petitioner of the pendency of the adoption proceedings deprived him of due process of law so as to render the adoption decree constitutionally invalid, and, if so, whether the subsequent hearing on the petitioner's motion to set aside the decree served to cure its constitutional invalidity.

In disposing of the first issue, there is no occasion to linger long. It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. "Many controversies have raged about the

cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v.Central Hanover Tr. Co.*, 339 U.S. 306, 313. "An elementary and fundamental requirement of due process in any process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections. (citations omitted) Questions frequently arise as to adequacy of a particular form of notice in a particular case. (citations omitted) But as to the basic requirement of notice itself there can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies. (citations omitted) The Texas Court of Civil Appeals implisitly recognized this constitutional rule, but held, in accord with its understanding of the Texas precedents, that whatever constitutional infirmity resulted from the failure to give the petitioner notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree. We cannot agree.

Had the petitioner been given the timely notice which the Constitution requires, the Manzos, as the moving parties, would have had the burden of proving their case as against whatever defenses the petitioner might have interposed. (citations omitted) It would have been incumbent upon them to show not only that Salvatore Manzo met all the requisites of an adoptive parent under Texas law, but also to prove why the petitioner's consent to the adoption was not required. Had neither side offered any evidence, those who initiated the adoption proceedings could not have

prevailed.

Instead, the petitioner was faced on his first appearance in the courtroom with the task of overcoming an adverse decree entered by one judge, based upon a finding of nonsupport made by another judge. As the record shows, there was placed upon the petitioner the burden of affirmatively showing that he had contributed to the support of his daughter to the limit of his financial ability over the period involved. The burden thus placed upon the petitioner were real, not purely theoretical. For "it is plain that where the burden of proof lies may be decisive of the outcome." (citations omitted) Yet these burdens would not have been imposed upon him had he been given timely notice in accord with the Constitution.

A fundamental requirement of due process is "the opportunity to be heard."

Grannis v. Ordean, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

Sniadach v. Family Finance Corp., 395 U.S. 337, at 339: We have dealt over and over again with the question of what constitutes "the right to be heard" (*Schoeder v. New York,* 391 U.S. 208, 212) within the meaning of procedural due process. *See Mullane v. Central Hanover Trust Co.,* 339 U.S. 306, 314. In the latter case we said that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." 339 U.S. at 314. In the context of this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due process.

A procedural rule that may satisfy due process for attachments in general, *See McKay v. McInnes,* 279 U.S. 820, does not necessarily satisfy procedural due process in every case. The fact that a procedure would

pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages – a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process. *Sniadach* at 343, Apart from special situations, some of which are referred to in this Court's opinion. See ante, at 339, I think that due process is afforded only by the kinds of "notice" and "hearing" which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property or its unrestricted use. I think this is the thrust of the past cases in this Court. (citations omitted)

Sniadach at 350, This view is consistent with that expressed by Mr. Justice Frankfurter in *Rochin v. Calif.* that due process was to be determined by "Those canons of decency and fairness which express the notions of justice of English-speaking peoples ...."

Goldberg v. Kelly, 397 U.S. 254, 3. A pre-termination evidentiary hearing is necessary to provide the welfare recipient with procedural due process. Pp. 264, 266-271. (a) Such hearing need not take the form of a judicial or quasi-judicial trial, but the recipient must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting adverse witnesses and by presenting his arguments and evidence orally before the decision maker. Pp. 266-270. (c) The decision maker need not file a full opinion or make formal findings of fact or conclusions of law but should state the reasons for his determination and indicate the evidence he relies on. P.271. (d) The decision maker must be impartial and although prior involvement in some aspects of the case will not necessarily bar a welfare official from acting as

maker, he should not have participated in making the determination under review. P. 271. *Goldberg* at 262. The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *See also Hannah v. Larche*, 363 U.S. 420, 440, 442 (1960).

Boddie v. Conn., 401 U.S. 254, at 377, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that "[W]herever one is assailed in his person or his property, there he may defend," *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). *See Baldwin v. Hale*, 1 Wall. 223 (1864); *Hovey v. Elliott*, 167 U.S. 409 (1897). The theme that "due process of law signifies a right to be heard in one's defense," *Hovey v. Elliott*, supra, at 417, has continually recurred in the years since *Bladwin*, *Windsor*, and *Hovey*. Although "[m]any controversies have raged about the criptic and abstract words of the Due Process Clause," as Mr, Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty

or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case," *Id.*, at 313.

Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, *see Windsor,* supra, at 278, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 351 (1909). What the Constitution does require is "an **opportunity ...** granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.,* supra, at 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, "within the limits of practicability," *id.*, at 318, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause.

Bell v. Burson, 402 U.S. 535, at 541, The hearing required by the Due Process Clause must be "meaningful," *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965), and "appropriate to the nature of the case."

Mullane v. Central Hanover Bank & Trust Co., supra, at 313. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision whether licenses of the nature here involved shall be suspended does not meet this standard.

While "[m]any controversies have raged about ... the Due Process Clause," *ibid.*, it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford "notice and opportunity for hearing appropriate to the nature of the case" **before** the termination becomes effective. (citations omitted)

Fuentes v. Shevin, 407 U.S. 67, 1. The Florida and Pennsylvania replevin provisions are invalid under the Fourteenth Amendment since they work a deprivation of property without due process of law by denying the right to a prior opportunity to be heard before chattels are taken from the possessor. Pp. 80-93. *Fuentes*, at 80. For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 1 Wall. 223, 233. *See Windsor v. McVeigh*, 93 U.S. 274: *Hovey v. Elliot*, 167 U.S. 409; *Grannis v. Ordean*, 234 U.S. 385. It is equally fundamental that the right to notice and opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552.

The primary question in the present cases is whether these state statute are constitutionally defective in failing to provide for hearings "at a meaningful time."

Parratt v. Taylor, 451 U.S. 527, at 537, In some cases this Court has held that due process requires a

predeprivation hearing before the State interferes with any liberty or property interest enjoyed by its citizens. In most of these cases, however, the deprivation of property was pursuant to some established state procedure and "process" could be offered before any actual deprivation took place. For example, in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Court struck down on due process grounds a New York statute that allowed a trust company, when it sought a judicial settlement of its trust accounts, to give notice by publication to all beneficiaries even if the whereabouts of the beneficiaries were known. The Court held that personal notice in such situations was required and stated that "when notice is a person's due, process which is a mere gesture is not due process," *Id., at 315.* More recently, in *Bell v. Burson*, 402 U.S. 535 (1971), we reviewed a state statute which provided for the taking of the driver's license and registration of an uninsured motorist who had been involved in an accident. We recognized that a driver's license is often involved in the livelihood of a person and as such could not be summarily taken without a prior hearing. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), we struck down the Florida prejudgment replevin statute which allowed secured creditors to obtain writs in **ex parte** proceedings. We held that due process required a prior hearing before the State authorized its agents to seize property in a debtor's possession. *See also Boddie v. Connecticut*, 401 U.S. 371 (1971); *Goldberg v. Kelley*, 397 U.S. 254 (1970) and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). In all these cases, deprivations of property were authorized by an established state procedure and due process was held to require predeprivation notice and hearing in order to serve as a check on the possibility that a wrongful deprivation would occur.

Commissioner v. Sunnen, 333 U.S. 591, at 597, It is

first necessary to understand something of the recognized meaning and scope of **res judicata,** a doctrine judicial in origin. The general rule of **res judicata** applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac,* 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. *See Von Moschzisker, "Res Judicata,"* 38 Yale L.J. 299; Restatement of the Laws of Judgment, Sections 47, 48.

But where the second action between the same parties is upon a different cause or demand, the principal of **res judicata** is applied much more narrowly. In this situation, the judgment in the prior action operates as an estopple, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac,* supra, 353. *And see Russell v. Place,* 94 U.S. 606; *Southern Pacific R. Co. v. U.S.,* 168 U.S. 1, 48; *Mercoid Corp. v. Mid-Continent Co.,* 320 U.S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at

issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the party, he cannot later renew the duel. In this sense, **res judicata** is usually and more accurately referred to as estopple by judgment, or collateral estopple. See Restatement of the Law of Judgment, Sections 68, 69, 70; Scott, "Collateral Estopple by Judgment," 56 Harv. L. Rev. 1.

These same concepts are applicable in the federal income tax field. Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is **res judicata** as to any subsequent proceeding involving the same claim and the same tax year. But if later proceeding is concerned with a similar or unlike claim relation to a different tax year, the prior judgment act as a collateral estopple only to matters in the second proceeding which were actually presented and determined in the first suit.

United States v. International Building Co., 345 U.S. 502, (a) In a subsequent action between the same parties on a different claim, a judgment is conclusive only as to the point or question actually litigated and determined in the original action, not as to what might have been litigated and determined. Pp. 504-505. (b) The decisions entered by the Tax Court for the years 1933, 1938 and 1939 were only **pro forma** acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. P. 505.

The governing principle is stated in *Cromwell v. County of Sac*, 94 U.S. 351, 352-353. A judgment is an

absolute bar to a subsequent action on the same claim.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estopple only as to matters in issue or points controverted, upon the determination of which the finding or verdict was rendered . In all cases, therefore, where it is sought to apply the estopple of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (citations omitted) Estopple by judgment, or collateral estopple as it is often called, is applicable in the federal income tax field. *Tait v. western Md. R. Co.*, supra, at 624; *Commissioner v. Sunnen*, supra, at 598.

We conclude that the decisions entered by the Tax Court for the years 1933, 1938 and 1939 were only a **pro forma** acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed. There is no showing either in the record or by extrinsic evidence (*See Russell v. Place*, 94 U.S. 606, 608) that the issues raised by the pleadings were submitted to the Tax Court for determination or determined by the court. They may or may not have been agreed upon by the parties.

Dziura v. U.S., 168 F.3d 581 (1st Cir. 1999) at 582, The Internal Revenue Code specifically provides that if the IRS, in the course of a tax collection effort, recklessly or intentionally disregards any provision of [the code]," the affected taxpayer(s) "may bring a civil action for damages against the United States in a district court of the United States." Id. Section 7433(a).

The rub is that all actions filed under 26 U.S.C. Section 7433(a) "may be brought only within 2 years after the date the right of action accrues." 26 U.S.C. Section 7433(d)(3). *Dziura* at 583, The implementing regulations suggest that this general rule also applies to cases under section 7433(a). See 26 C.F.R. Section 301.7433-1(g)(2) (stipulating that a cause of action brought under 7433(a) "accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action"). n.3

n.3 We do not foreclose the possibility that an unusual set of circumstances might arise in which a continuing violation theory would allow a taxpayer to assert that he could not have discovered the essential elements of his section 7433(a) claim until more than two years following the date of the initial wrong. *See, e.g. Hurt v. U.S.*, 914 F.Supp. 1346, 1355-56 & n.6 (S.D.W.Va. 1996). The instant case falls within the general rule, however, not within the longodds exception to it.

Hurt v. U.S., 914 F.Supp. 1346 (S.D.W.Va. 1996), at 1355,

While there is authority to the contrary, several courts have concluded Section 2401(b) may be tolled in instances where the United States engaged in tortious conduct. *See, e.g., Wehrman v. U.S.*, 830 F.2d 1480 (8th Cir. 1987); *Page v. U.S.*, 729 F.2d 818, 821-22 (D.C.Cir. 1984) (stating "It is well-settled that '[w]hen a tort involves continuing injury, the cause of action accures, and the limitation period begins to run, at the time the tortious conduct ceases.' Since usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm,' it seems proper to regard the cumulative effect of the conduct as actionable."); *Gross v. U.S.*, 676 F.2d 295, 300 (8th Cir. 1982) (stating 'Where the tortious conduct is a

continuing nature, the **Kubrick** rule does not apply. Under the circumstances of this case, the focus should be on when the last tortious act occurred."). *Hurt* at 1356,

[17] Mr. Hurt alleges a continuing pattern of tortious harassment over the course of many years that has not abated to this day. His reliance on the continuing tort exception is particularly apropos because each individual audit and retaliatory action taken in isolation cannot "fairly or realistically be identified as the cause of significant harm[.]'" *Page*, 729 F.2d at 822. Rather, it is the "cumulative effect" of the harassment that is significant for litigation purposes. Id. The Court thus concludes Mr. Hurt is entitled to rely upon the continuing tort exception to Section 2401(b). Accordingly, his claim has not yet accrued under, much less been extinguished by, Section 2401(b). Defendants' argument to the contrary is without merit. n.6

n.6 The same is true under the limitations provisions for Section 7433. Section 7433(d)(3) provides as follows:

Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought ... only within 2 years after the date the right of action accrues. Id. Congress clearly intended a portion of the substantive law surrounding Section 2401(b) to be used in interpretation and application of Section 7433(d)(3). See, e.g., H.R.Conf.Rep. No. 1104, 100th Cong., 2d Sess. 228 n.1 (1988), reprinted in 1988 U.S.C.C.A.N. 5048, 5288 n. 1. (stating "The conferees intend that the general accural rule applied under the Tort Claims Act (28 U.S.C. sec. 2401(b) be applied to actions under this provision; the right of action does not accrue until a claimant has had a reasonable opportunity to discover all essential elements of a possible cause of action ...").

The Court thus concludes the continuing tort exception under Section 2401(b) would apply with equal force to the limitation period contained in Section 7433 (d)93).

Gross v. U.S., 676 F.2d 295 (8th Cir. 1982), at 296, Statute of limitations on farmer's claim under Federal Tort Claims Act for intentional infliction of emotional distress arising out of county agricultural stabilization and conservation service committee conduct in denying him participation in feed grain program commenced to run not on date that farmer knew or should of known of his injury but on date of last tortious act, since committee's actions may have constituted continuing tort. 28 U.S.C.A. Section 2401(b).

Wehrman v. U.S., 830 F.2d 1480 (8th Cir. 1987) When tort claim against United States accrues is question of federal law requiring determination of when plaintiff actually knew, or in exercise of reasonable diligence should have known, cause and existence of injury. 28 U.S.C.A. Sections 1346 et seq., 2401, 2401(b).

3. **Limitation of Actions**

Government's fraudulent concealment of material facts prevents running of statutory period governing claim under Federal Tort Claims Act until plaintiff discovers, or by reasonable diligence could discover, basis of claim. 28 U.S.C.A. Sections 1346 et seq., 2401, 2401(b), 2671 et seq.

5. **Limitation of Actions**

Under "continuing treatment doctrine," patient's cause of action does not accrue until tortious continuing treatment ends, even if patient is aware of facts constituting negligence before that time.

Wehrman v. U.S., at 1481, In this appeal from a grant of summary judgment, the plaintiff, Floyd L. Wehrman, asserts that his claim for damages arising

out of alleged malpractice by the Veterans Administration hospital is not barred by the two-year limitation period set forth in 28 U.S.C. Section 2401(b), because the allegedly tortious continuing treatment did not end until some time within two years prior to his complaint. Because we disagree with the district court's determination that the "continuous treatment" doctrine is inapplicable in this case, we will vacate the district court's order and remand the case for further proceedings.

Page v. U.S., 729 F.2d 818 (D.C. Cir., 1984), at 821,

[4] It is well-settled that "[w]hen a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases. Since usually no single incident in a continuous chain of tortious activity can "fairly or realistically be identified as the cause of significant harm," it seems proper to regard the cumulative effect of the conduct as actionable. Moreover, since "one should not be allowed to acquire a right to continue the tortious conduct, it follows logically that statutes of limitation should not run prior to its cessation.

Snook v. Trust Co. of Georgia Bank of Savannah, N.A., 859 F.2d 865 (11th Cir. 1988) *Snook* at 866,

2. **Federal Civil Procedure**

If documents or other discovery sought would be relevant to the issues presented by motion for summary judgment, opposing party should be allowed opportunity to utilize discovery process to gain access to requested materials.

3. **Federal Civil Procedure**

Generally, summary judgment is inappropriate when party opposing motion has been unable to obtain responses to his discovery requests.

4. **Federal Civil Procedure**

Party opposing motion for summary judgment need not file affidavit pursuant to Rule 56(f) in order to

invoke protection of rule; interests of justice sometimes requires district court to postpone its ruling on motion for summary judgment even though technical requirements of rule have not been. met. Fed.Rules Civ.Proc. Rule 56(f), 28 U.S.C.A.

5. **Federal Civil Procedure**

Trial court improperly entered summary judgment in favor of trust company and trustees in action brought by trust beneficiers without first ruling on beneficiers' motion to compel discovery; many documents requested by beneficiaries were relevant to issues raised by motion for summary judgment and many of the requested documents were discoverable. *Snook* at 869, The defendants filed a general objection to all of plaintiffs' requests for discovery and, as noted above, the plaintiffs filed a motion to compel production of the documents requested. The district court never ruled on the motion. The plaintiffs argue that their inability to obtain the documents requested makes the granting of summary judgment improper.

In reviewing a district court's grant of summary judgment, this court's review is "plenary and is to be conducted utilizing the same legal standards as those imposed upon the district court." *WSB-TV v. Lee,* 842 F.2d 1266, 1269 (11th Cir. 1988). The Supreme Court has recently addressed the standards for granting motions for summary judgment. In *Celotex Corp. v. Catrett,* the Court addressed the burden to be placed on the nonmoving party as follows: In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. 477 U.S. 317, 322, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265, 273 (1986) (emphasis added).

This court has recently considered the application of *Celotex,* and other recent Supreme Court cases, to cases in which the nonmoving party has not had an adequate opportunity to conduct discovery. In *WSB-TV v. Lee,* we reviewed the Supreme Court's decision in *Celotex,* in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed2d 202 (1986), and in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 547, 106 S.Ct. 1348, 89 L.Ed/ed 538 (1986). We concluded that the common denominator of the the three cases is "summary judgment may only be decided upon an adequate record." 842 F.2d at 1268, Because the plaintiffs in *WSB-TV* had been afforded no opportunity for discovery, we held that consideration of the defendant's motion for summary judgment was erroneous.

[1-3] This court has often noted that summary judgment should not be granted until the party opposing the motion has had an adequate opportunity for discovery. *E.g., Littlejohn v. Shell Oil Co.,* 483 F.2d 1140, 1145 (5th Cir. 1973) (en banc), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (noting the high fatality rate of summary dispositions at a time before the facts have been fully developed); *Alabama Farm Bureau Mutual Casualty Co. v. American Fidelity Life Insurance Co.,* 606 F.2d 602, 609 (5th Cir. 1979), cert. denied, 449 U.S. 820, 101 S.Ct. 77, 66 L.Ed.2d ("Summary Judgement should not, therefore, ordinarily be granted before discovery has been completed."); *Murrell v. Bennett,* 615 F.2d 306, 310 (5th Cir. 1980) Citing *Alabama Farm Bureau.* The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to enable him to determine whether he can furnish opposing affidavits. *Parrish v. Board of Commissioners of the Alabama State Bar,*

533 F.2d 942, 948 (5th Cir. 1976). If documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. Id. Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests. *Cowan v. J.C.Penney Co.Inc.*, 790 F.2d 1529, 1532 (11th Cir. 1986).

The issue of inadequate discovery was called to the district court's attention by the parties in their briefs addressed to the motion to compel. In their response to the plaintiffs' motion to compel, defendants asserted that a ruling in their favor on the pending motion to dismiss or for summary judgment would render moot any discovery issue. Plaintiffs responded to this assertion by reminding the district court that "motions for summary judgment are premature and should not be granted until the party opposing such motion is permitted to make discovery essential to his case." Therefore, the district court should have been aware of the plaintiffs' contention that they had not been able to obtain, through discovery, evidence essential to their opposition to the motion for summary judgment. The discovery requested was clearly relevant to pending motion for summary judgment, both as to the securities fraud and RICO counts.

[4] In this Circuit, a party opposing a motion for summary judgment need not file an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in order to invoke the protection of that Rule. In *Littlejohn*, the court "[o]ut of an abundance of caution and to prevent a possible injustice," held that an affidavit was not required to invoke the protection of Rule 56(f). 483 F.2d at 1146. The court concluded that "the written representation by [plaintiff's] lawyer, an

Officer of the court, it is the spirit of Rule 56(f) under the circumstances. Form is not to be exalted over fair procedures." Id. Requiring the party opposing a motion for summary judgment to explicitly and unequivocally invoke the protection of Rule 56(f) through the means of an affidavit would provide certainty to district courts. However, the law of this Circuit recognizes that the interests of justice will sometimes require a district court to postpone its ruling on a motion for summary judgment even through the technical requirements of Rule 56(f) have not been met

[5] In *Cowan*, this court held that the nonmovant's "failure to file a motion under Fed.R.Civ.P. 56(f) to foreclose entry of summary judgment [did] not invalidate her claim that the entry of that judgment was error." 790 F.2d at 1532. However, the party opposing the motion for summary judgment bears the burden of calling to the district court's attention any outstanding discovery. Id. At 1530. In *Cowen*, the court concluded that the nonmovant properly appraised the district court of the outstanding discovery requests.

[W]e find that prior to the entry of summary judgment she had properly brought to the district court's attention that the discovery response from World Shoe Corp. was still outstanding. The record clearly indicates that Cowen sought an order to compel World Shoe's response which was granted by the district court on Nov. 8, 1984. Id. At 1532.

In the case at hand, plaintiffs' filed a motion to compel, which was briefed extensively. The motion sought to compel the production of documents relevant to the pending motion for summary judgment. Therefore, plaintiffs properly directed the district court's attention to the fact that their discovery requests were still outstanding. The district court

should have ruled on the motion to compel prior to entering summary judgment for the defendants. Its failure to rule on the motion to compel circumvented the policy underlying discovery in cases in which a summary judgment motion is filed.

[T]he whole purpose of discovery in a case in which a motion for summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and he considers essential to enable him to determine whether he can honestly file opposing affidavits. *Parrish*, 533 F.2d at 948. By failing to rule on the motion to compel, the district court deprived the plaintiffs' of their right to utilize the discovery process to discover the facts necessary to justify their opposition to the motion. It is clear that many of the documents requested are relevant to the issues raised by the defendants' motion for summary judgment. It is also clear that many of the requested documents are discoverable. Accordingly, the entry of summary judgment and dismissal of the pendent state law claims was improper and must be reversed. On remand the district court should consider the plaintiffs' motion to compel in light of the rules governing discovery and should order the requested documents produced as appropriate. Once there is an adequate record, the district court may again consider the defendant's motion for summary judgment.

WSB-TV v. Lee, 842 F.2d 1266 (11th Cir. 1988) at 1267,

1. **Federal Courts**

Grant of summary judgment before plaintiffs had been afforded opportunity for discovery was reversible error. *WSB-TV* at 1269, Our review of the district court's grant of summary judgment is plenary and is to be conducted utilizing the same legal standards as those imposed upon the district court. *Merchantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838,

841, (11th Cir. 1985). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories , and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c)

Three recent Supreme Court cases vacating appellate reversals oh district court orders granting summary judgment illuminate both the utility and the limitations of summary procedure. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Their common denominator is the Court's caveat that summary judgment may only be decided upon an adequate record.

In *Anderson,* the Court held that Rule 56(e) provides that, "when a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.' 106 S.Ct. at 2511.

The Court underscored that:

This requirement in turn is qualified by Rule 56(f)'s provision that summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. In our analysis here, we assume that both parties have had ample opportunity for discovery.

Id. At n.5.

In *Celotex,* the Court held that "Rule 56(c mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof

at trial" but only "after adequate time foe discovery." 106 S.Ct. at 2552-53. In concluding that the district court had properly granted summary judgment, the Court noted that "[t]he parties had conducted discovery, and no serious claim can be made that respondent was in any sense 'railroaded' by a premature motion for summary judgment." 106 S.Ct. at 2554. Recognizing that premature motions present a problem, the Court concluded that the problem: can be adequately dealt with under Rule 56(f), which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery. 106 S.Ct. at 2554-55.

In *Matsushita*, 106 S.Ct. at 1352, the Court considered it significant that the parties had conducted "several years of detailed discovery."

[1] In the case **sub judice** plaintiffs had been afforded no opportunity for discovery. Under circumstances outlined above, consideration of defendant's motion for summary judgment in this six- month old case was erroneous. *Parrish v. Board of Commissioners*, 533 F.2d 942, 951 (5th Cir. 1976) (trial court did not allow relevant discovery; summary judgment was reversed).

[2] Moreover, with gaze too foreshortened upon physical encounter on November 6, 1968, the court did not discuss and apparently failed to consider conflicting inferences, reasonable to be drawn from all of the affidavits on file, as to the motivation of the sheriff's conduct on that occasion.

In determining whether the party who moves for summary judgment has met his burden of establishing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law, the evidence and inferences drawn from the evidence are viewed in light most favorable to the nonmoving party, and all reasonable doubts are resolved in his

favor. *Mercantile Bank*, supra, 750 F.2d at 841. In deciding whether an inference is reasonable, the court must "cull the universe of possible inferences from the facts established by weighing each other against the abstract standard of reasonableness." *Southway Theatres, Inc. v. Georgia Theatre Co.*, 672 F2d 485, 493 (5th Cir.Unit B 1982). The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. Id at 495. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one. Id.

After a careful review of the record, we are persuaded that a reasonable inference to be drawn from affidavits submitted by plaintiffs is that the November 6th incident was but one episode in the ongoing effort of defendant to thwart or impede plaintiffs in gathering and reporting news relating to rumors of the sheriff's use of inmate labor on his private property, an interference with plaintiffs' first amendment rights which would violate 42 Section 1983. Thus, the entry of summary judgment was interdicted and requires reversal.

REVERSED and REMANDED.

Cowan v. J.C. Penney Co., Inc. 790 F.2d 1529 (11th Cir. 1986)

1. **Federal Civil Procedure**

Party opposing motion for summary judgment bears responsibility for bringing to trial court's attention any outstanding discovery in the cause. Fed.R,Civ.P. Rule 56(f), 28 U.S.C.A.

2. **Federal Civil Procedure**

In slip and full case alleging defective condition of shoe and negligence of store owner due to unsafe condition of store premises, there were genuine issues

of material fact as to fitness of shoe, slippery condition of floor and raised condition of metal strip, precluding summary judgment. Fed.R.Civ.P. 56(c), 28 U.S.C.A.; Ala. Code 1975, Section 7-2-314(2)(c).

.3. **Federal Civil Procedure**

Prior to entry of summary judgment against her, plaintiff had properly brought to the district court's attention that discovery response from defendant was outstanding, and her failure to file motion to foreclose entry of summary judgment did not invalidate her claim that entry of judgment was error. Fed.R.Civ.P. Rule 56(f), 28 U.S.C.A. *Cowen* at 1530.

On appeal, Cowen challenges the grant of summary judgment as inappropriate on two grounds. First, she claims that there was a genuine issue as to a material fact in dispute upon which summary judgment cannot be based. Second, she claims that summary judgment at this time is precluded because her interrogatories to appellees are still outstanding, in spite of a district court order compelling response.

Appellees argue that the district court was correct in granting their motions for summary judgment because there was no genuine issue as to a material fact in dispute and they were therefore entitled to summary judgment as a matter of law. They assert that the outstanding discovery request does not preclude summary judgment because Cowen did not make an adequate showing under Fed.R.Civ.P. 56(f) to delay entry of summary judgment.

When reviewing a district court order granting summary judgment, this court applies the same legal standard as does the district court. *Thrasher v. State Farm Fire & Casualty Co.*, 734 F.2d 637, 638 (11th Cir. 1984). Under Fed.R.Civ.P. 56(c) summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The court must view the evidence in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

[1] The moving party bears the burden of demonstrating the absence of a dispute as to any material fact and of showing that he or she is entitled to judgment as a matter of law. Id, *Combs v. King*, 764 F.2d 818, 827 (11th Cir. 1985). Once a motion for summary judgment has been made and supported as required, however, the opposing party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). If the opposing party has difficulty in obtaining affidavits or discovery, he or she may seek a continuance under Fed.R.Civ/P. 56(f). The opposing party bears the responsibility of bringing to the trial court's attention any outstanding discovery in the cause.

The record on appeal in the instant case reflects the following discovery efforts and pleadings, *Cowen* at 1531,

Following World Shoe Corp.'s summary judgment motion, Cowan filed a motion for a order compelling World Shoe Corp. to answer interrogatories propounded by plaintiff, which was granted Nov. 8. On Nov. 14, Cowan propounded a second set of interrogatories and requests for production on defendants. No response to these discovery requests were ever received. After the court notified the parties on Nov. 21 that the two motions for summary judgment were going to be taken under advisement on Dec. 5, Cowen filed an affidavit on Dec. 4, 1985,

repeating her statements that the heel cap had come off her shoe, that the metal strip was part of the cause of her fall, and that the floor had been slippery. etc.

On the basis of the record, the district court granted the defendant's motions for summary judgment an Apr. 12, 1985. Cowen filed a motion for reconsideration on April 19, 1985, etc. The district court denied the motion for reconsideration on May 20, 1985.

[2] We find that the district court erred in granting summary judgment. The affidavits, deposition, and responses to discovery indicate that there were genuine disputes as to material facts. Etc. *Cowan* at 1532,

[3] Cowan's failure to file a motion under Fed.R.Civ.P. 56(f) to foreclose entry of summary judgment does not invalidate her claim that the entry of that judgment was error. The purpose of Rule 56(f) is to allow parties opposing summary judgment an opportunity to obtain additional time or to be excused from obtaining unavailable affidavits or other discovery. Cowan, however, had already filed answers to interrogatories, a deposition, and an affidavit as to the disputed facts, etc. We have held that, generally, summary judgment is premature when the moving party has not answered the opponent's interrogatories. *Murrell v. Bennett*, 615 F.2d 306, 310 (5th Cir. 1980) We find that especially true in this case where Cowen propounded interrogatories to World Shoe Corp. which request information that is critical to the issues in dispute.

We find that summary judgment was improper as a matter of law on the record of this case, We therefore REMAND the case to the district court for trial on the merits.

Murrell v. Bennett, 615 F.2d 306 (5th Cir. 1980) at 310,

[3] Appellees also assert that Murrell did not meet his burden of rebutting their showing by supplying affidavits or other material evidence. *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Garcia v. American Marine Corp.*, 432 F.2d 6 (5th Cir. 1970).

The absence of documents for Murrell is the very injustice of this case. Indigent prisoners are hampered in their access to the proof necessary to ward off summary judgment. Murrell had no opportunity to provide this information because his unschooled attempts at requesting discovery were nipped in the bud only thirty-two days after the complaint was filed. This court noted in *Alabama Farm* that summary judgment normally should not be granted before discovery is completed. 606 f.2d at 609. Murrell's discovery was never allowed to begin, etc. Although his documents may be inartful, the thrust of his requests was clear: he wanted the chance to show that material disputes did exist.

Summary judgment is a valuable judicial tool. Because its consequences are so severe, however, we must always guard against premature truncation of ligitimate lawsuits merely because of unskilled presentations. The district court's judgment is REVERSED.

Alabama Farm Bureau Casualty Co., Inc., v. American Fidelity Life Insurance Company, etc. et al., 606 F.2d 602 (5th Cir. 1979) at 603,

(4) Federal Civil Procedure

Burden is on party seeking summary judgment to show that there is no genuine issue of material fact.

(5) Federal Civil Procedure

In considering a summary judgment motion, the inferences most favorable to the party opposing the motion will be drawn, as such inferences may create disputes regarding the basic facts or regarding facts to

to be inferred from such facts.

(6) Federal Civil Procedure

Summary Judgment should not ordinarily be granted before discovery has been completed, especially in a stockholder's derivative action.

(7) Federal Civil Procedure

Summary judgment may be inappropriate, even though basic facts are undisputed, if the ultimate facts in question are to be inferred from them, and the parties disagree regarding the permissible inferences that can be drawn from the basic facts.

(8) Federal Civil Procedure

Where a jury is called for, litigants are entitled to have the jury choose between conflicting inferences from basic facts, however, where the judge is a trier of fact he may be in a position, for summary judgment purposes, to draw inferences without resort to the expense of trial, unless there is an issue of witness' credibility.

Alabama at 607,

Alabama Farm made a number of attempts to exercise its discovery rights, but they were largely resisted by the defendants, and the district court did not order full discovery. For example, the defendants were served with interrogatories in January, 1975, but only one interrogatory was answered, and that was only after the district court had ordered a response.

In January, 1975, Alabama Farm also sought the protection of minute books of AMFI's Executive Committee, Finance Committee and Board of Directors. These books were never produced, even through Alabama Farm offered to examine them at any location specified by the defendants so as not to disrupt AMFI's operations. The district court never heard or ruled on two motions Alabama Farm filed seeking to compel production of these records.

Alabama at 609,

[4,5] The burden is on the party seeking summary judgment to show that there is no genuine issue of material fact. The "party opposing the motion is to be given the benefit of all reasonable doubt determining whether a genuine factual issue exists." *Kellerman v. Askew* , 541 F.2d 1089, 1092 (5th Cir. 1976). In considering a summary judgment motion, the inferences most favorable to the party opposing the motion will be drawn. *Boazman v. Economics Lab., Inc.*, 537 F.2d 210, 214, (5th Cir. 1976) Such inferences may create disputes regarding basic facts or regarding facts to be inferred from such facts.

[6] "In applying the basic principles the factor of access to proof must, however, be seriously considered in ruling on a defendant's motion for summary judgment, particularly in [a stockholder's derivative action] where plaintiff's proof must come mainly from sources largely within the control of the defendants and from the mouths of the alleged wrongdoers." 6 Moore's Federal Practice Section 56.17[60] at 56-1065 (1976 ed.)(footnotes omitted). Summary judgment should not, therefore, ordinarily be granted before discovery has been completed. (citations omitted) "' Cases in which the underlying issue is one of motivation, intent, or some other subjective fact are particularly inappropriate for summary judgment, as are those in which the issues turn on the credibility of the affients.' (citations omitted)

[7,8] Summary judgment may be improper, even though the basic facts are undisputed, if the ultimate facts in question are to be inferred from them, and the parties disagree regarding the permissible inferences that can be drawn from the basic facts. *Winter v. Highlands*, 569 F.2d 297, 299, (5th Cir. 1978) "'[The choice between permissible inferences is for the trier of facts.' " *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124, quotimg, *Walker v. U.S. Gypsum.*, 363 U.S. 805,

80 S.Ct. 1240, 4 L.Ed.2d 1148. Where a jury is called for, litigants are entitled to have the jury choose between conflicting inferences from basic facts. *Nunez*, supra, 572 F.2d at 1124. However, where the judge is the trier of fact, as was the case here, he may be in a position to draw inferences without resort to the expense of trial, unless there is an issue of witness credibility. See id. at 1124-25.

Alabama at 617,

Although Alabama Farm's suit is premised, at this point, on unproved inferences from circumstantial evidence, it states a cause of action and involves disputed issues of fact; therefore, under Federal Rules of Civil Procedure, Alabama Farm has a right to further discovery. *See Subin v. Goldsmith*, supra, 224 F.2d at 761.

Parrish v. Board of Com'rs of Alabama State Bar, 533 F.2d 942 (5th Cir. 1976) at 943,

[2] Federal Civil Procedure

Trial court in class action by blacks alleging racial discrimination by Boards of Commissioners and Bar Examiners of Alabama Bar Association in their policies and practices governing admission to bar erred in entering summary judgment against plaintiffs without requiring production of examination papers and graders' notes requested by plaintiffs as part of their pretrial discovery. 28 U.S.C.A. Sections 2201, 2201; 42 U.S.C.A. Sections 1981-1983; Fed.R.Civ.P. Rule 56(f), 28 U.S.C.A.

Parrish at 946,

IV. PROPRIETY OF SUMMARY JUDGMENT.

With these preliminary considerations aside, we come to the appellants' principal argument: that summary judgment in this case was inappropriate, because the trial court did not allow complete discovery. Appellants also argue that there were material issues of fact that the appellees were not

entitled to summary judgment on the law, but their main contention is that summary judgement was precluded as a matter of law because there were outstanding motions to compel interrogatories and that without this information they were unable to prepare adequately their affidavits in opposition to the motion for summary judgment.

(A) Adequacy of Discovery

[2] The appellees moved for summary judgment on April 12, 1973, and on April 20, the court held a hearing to consider the motion. The court asked counsel for the appellants pointedly what further discovery they needed in order to "present by affidavit facts essential to justify your opposition" to the motion for summary judgment. Counsel for the appellants replied that they needed answers from the Chairman of the Board of Examiners to interrogatories and the transcripts of depositions taken of two of the bar examiners. After agreeing that it would reserve these items, the trial court then asked counsel for the appellants: "Now, what other discovery are you seeking?" Counsel replied: "Well, in light of our discussion this morning we also would need to inspect the minutes [of the state bar association] again. We have a motion for production of documents. We will need to see the files of persons who have applied to take the bar examination."

In the four months intervening between this hearing and the issuance of the order granting summary judgment, the appellants accomplished all of the discovery they had requested at the hearing—with one exception: the appellees failed to produce the "documents" mentioned by the counsel for the appellants, which consisted of all answer sheets and all grading notes made by the examiners for the Feb., 1973, bar examination. Appellants filed a motion to compel production of these documents on May 28, but

the trial court never ruled on the motion.
Parrish at 948,

It is horn-book law that a trial court may not grant a motion for summary judgment unless "the basic facts are undisputed and that there is no dispute between the parties as to any factual inferences that may be drawn from such facts ..." *Sinderman v. Perry*, 430 F.2d 939 (5th Cir. 1970), aff'd, 408 U.S. 593, 93 S.Ct. 2694, 33 L.Ed.2d 570, and that "all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion for summary judgment." *Time, Inc, v. Ragano*, 427 F.2d 219 (5th Cir. 1970).
Parrish at 951,

We conclude that the trial court erred in entering summary judgment without having first required the defendants to make available for inspection as requested by the plaintiffs the examination papers and graders' notes, if any, for the year 1973.

The judgment of the trial court is REVERSED and REMANDED for further proceedings not inconsistent with this opinion.
Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986)
(1) Federal Civil Procedure
Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish that existence of an element essential to that party's case and on which that party will bear the burden of proof at trial, Fed.R.Civ.P. Rule 56(c), 28 U.S.C.A.
(2) Federal Civil Procedure
Party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories , and admissions on file, together with

affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed.R.Civ.P.. Rule 56(c), 28 U.S.C.A.

(7) Federal Civil Procedure

Nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Fed.R.Civ.P. Rule 56(e), 28 U.S.C.

Celotex at 2552,

"[T]h[e] standard [for granting summary judgment] mirrors the standards for a directed verdict under Federal Rule of Civil Procedure 50(a) ..." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)

[3-5] Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, identifying those portions of " the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, "which it believes demonstrate the absence of a genuine issue of material fact.

[7] We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

Celotex at 2554,

Respondent commenced this action on Sept. 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense

"railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f), n.6

n.6 Rule 56(f) provides:

"Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just."

which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

Celotex at 2555,

Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case remanded for further proceedings consistent with this opinion.

Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (S.Ct. 1986), at 582,

We granted certiorari to determine (I) whether the Court of Appeals applied the proper standards in evaluating the district court's decision to grant petitioner's motion for summary judgment.

Matsushita at 585,

The issues in this case thus become whether

respondents adduced sufficient evidence in support of their theory to survive summary judgment. We therefore examine the principles that govern summary judgment determination.

To survive petitioners' motion for summary judgment, n.10 respondents must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused respondents to suffer a cognizable injury. Fed.R.Civ.P. Rule 56(e); n.11 *First National Bank of Arazonia v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)

n.10 Respondents argued before the district court that petitioners had failed to carry their initial burden under Fed.R.Civ.Proc. Rule 56(c) of demonstrating the absence of a genuine issue of material fact, *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

n.11 Rule 56(e) provides, in relevant part:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him."

Second, the issue of fact must be "genuine." Fed.R.Civ.P. 56 (c). When the moving party has carried its burden under Rule 56(c), (n.12 See n. 10, supra.) its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See deLuca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (CA2 1949) (L. Hand, J.), cert. denied, 338 U.S. 943 (1950); 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure Section 2727 (1983); Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand. L. Rev. 493,

504-505 (1950). Cf. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944). In language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a **genuine issue for trial.**" Fed.R.Civ.P. 56(e) (emphasis added) See also Advisory Committee Note to 1963 Amendment of Fed.R.Civ.P. 56(e), 28 U.S.C.App., p. 626 (purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial"). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Cities Service*, supra, at 289.
Matsushita at 587.

Respondents correctly note that "[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)
Matsushita at 600.
In a similar vein, the Court summarizes *Monsanto Co. v.Spray-Rite Service Corp.*, supra, as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible ..." Ante, at 593. Such language suggests that a judge hearing a defendant's motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff. *Cities Service* and *Monsanto* do not stand for any such proposition. Each of those cases simply held that a particular piece of evidence standing alone was insufficiently probative to justify sending a case to the jury. These holdings in no way undermine the doctrine that all evidence must be construed in the light most favorable to the party opposing summary judgment.
Adickes v. S.H. Kress & Co., 398 U.S. 144 (S.Ct. 1970)

(1) The district court on the basis of the record erred in granting summary judgment on the conspiracy count. Pp. 149-161.

.(a) The involvement of a policeman, a state official, whether or not his actions were lawful or authorized, in the alleged conspiracy would plainly provide the state action needed to show a direct violation of petitioner's Fourteenth Amendment rights entitling her to relief under Section 1983, and private persons involved in such a conspiracy are acting "under color" of law and can be liable under Section 1983. Pp. 150-152.

.(b) Respondent did not carry out its burden, as the party moving for summary judgment, of showing the absence of a genuine issue as to any material fact, as it did not foreclose the possibility that there was a policeman in the store while the petitioner was awaiting service (from which the jury could infer an understanding between the officer and an employee of respondent that petitioner not be served), and its failure to meet that burden requires reversal. Pp. 153-159.

.(c) Because respondent failed to meet its initial burden as the party moving for summary judgment, petitioner was not required to come forward with suitable opposing affidavits under Fed.R.Civ.P. 56(e). Pp. 159-161.

Adickes at 148,

As explained in Part I, because the respondent failed to show the absence of any disputed material fact, we think the district court erred in granting summary judgment.

Adickes at 153,

We now proceed to consider whether the district court erred in granting summary judgment on the conspiracy count. In granting respondent's motion, the district court simply stated that there was "no

evidence in the complaint or in the affidavits and other papers from which 'reasonably-minded person' might draw an inference of conspiracy," 252 F.Supp., at 144, aff'd, 409 F.2d, at 126-127. Our own scrutiny of the factual allegations of petitioner's complaint, as well as the material found in the affidavits and depositions presented by Kress to the district court, however, convinces us that summary judgment was improper here, for we think respondent failed to carry its burden of showing the absence of any genuine issue of fact. *Adickes* at 157,

We think that on the basis of the record, it was error to grant summary judgment. *Adickes* at 158,

Because "[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving parties] materials must be viewed in the light most favorable to the party opposing the motion," *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), we think respondent's failure to show there was no policeman in the store requires reversal.

Pointing to Rule 56(e), as amended in 1963, respondent argues that it was incumbent on petitioner to come forward with an affidavit properly asserting the presence of the policeman in the store, if she were to rely on the fact to avoid summary judgment. Respondent notes in this regard that none of the materials upon which petitioners relied met the requirements of Rule 56(e).

This argument does not withstand scrutiny, however, for both the commentary on and background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact. The Advisory Committee note on the amendment states

that the changes were not designed to "affect the ordinary standards applicable to the summary judgment." And, in a comment directed specifically to a contention like respondent's, the Committee stated that "[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied **even if opposing evidentiary matter is presented.**" Because respondent did not meet its initial burden of establishing the absence of a policeman in the store, petitioner here was required to come forward with suitable opposing affidavits.

Combs v. King, 764 F.2d 818 (11th Cir. 1985) at 819,

.7. Federal Civil Procedure

Party seeking summary judgment bears exacting burden of showing both there is no actual dispute as to any material fact and that moving party is entitled to judgment as a matter of law.

.C. **Summary Judgment** *Combs* at 827.

.[7] " On appeal from summary judgment the record must be viewed in the light most favorable to the party opposing the motion." *Benton-Volvo-Metairie, Inc. v. Volvo Southwest, Inc.,* 479 F.2d 135, 138 (5th Cir. 1973). The party seeking summary judgment bears the exacting burden of showing both that there is no actual dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Id.

In this case, the Trustees' burden in responding to the summary judgment motion was to offer significant probative evidence that tended to support its complaint. *Pan Islamic Trade Corp. v. Exxon,* 632 F.2d 539, 554 (5th Cir. 1980), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981).

.[8] The trustees met their burden when they produced the affidavits of two of Mrs. King's

employees and of the certified public accountant. These affidavits raised genuine questions about the accuracy of Mrs. King's records and the number of hours worked by her employees.

Given the ambiguities in the record, the conflicting versions regarding the number of hours worked by Mrs. King's employees, and the competing factual inferences that arose, it is clear that Mrs. King should not have obtained a summary judgment. She failed to carry the burden of demonstrating that there is no actual dispute as to the material facts in the case. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

For reasons stated above, we hold that the district court erred in granting summary judgment.

.III. CONCLUSION

The district court erred when it found that Mrs. King did not have a duty to maintain records and did not have the burden of proving the actual numbers of hours worked in the absence of clear records. The court also erred in granting summary judgment. For these reasons we REVERSE and REMAND to the district court for further consideration in light of this opinion.

REVERSED and REMANDED.

Mercantile Bank & Trust v. Fidelity & Deposit Co., 750 F.2d *38 (11th Cir. 1985)

.1. Federal Courts

Court of Appeals must independently review district court's order granting summary judgment and determine whether any genuine issue of material fact exists. Fed.R.Civ.P. Rule 56(c), 28 U.S.C.A.

.2. Federal Courts

When Court of Appeals examines a decision granting or denying summary judgment, it applies same legal standards that control district court's determination. Fed.R.Civ.P. Rule 56(c), 28 U.S.C.A.

.3. Federal Civil Procedure

A party seeking summary judgment bears burden of demonstrating that no genuine dispute exists as to any material fact in case. Fed.R.Civ.P. Rule 56(c), 28 U.S.C.A.

.4. Federal Courts

In determining whether a movant has met burden on motion for summary judgment of demonstrating that no genuine dispute exists as to any material fact, Court of Appeals reviews evidence and all factual inferences therefrom in light most favorable to party opposing motion, with reasonable doubts about facts resolved in favor of nonmovant. Fed.R.Civ.P. Rule 56(c),U.S.C.A.

.5. Federal Civil Procedure

If reasonable minds might differ on inferences arising from undisputed facts, then a court should deny summary judgment.

Mercantile at 841,

Issue

The sole issue on appeal is whether the district court erred in granting the government's motion for summary judgment.

Discussion

.[1,2] Appellant, Mercantile Bank and Trust Company, Ltd., contends that the district court erred in its determination that no genuine issue of material fact exists as to the ownership of the collateral deposit funds interpleaded in this action. We must independently review the district court's order granting summary judgment and determine whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c); *Morrison v. Washington County, Alabama*, 700 F.2d 678 (11th Cir. 1983). When we examine a decision granting or denying summary judgment, we apply the same legal standards that control the district court's determination. *Environmental Defense Fund v. Marsh*,

651 F.2d 983, 991 (5th Cir. 1981).

.[3-5] A party seeking summary judgment bears the burden of demonstrating that no genuine dispute exists as to any material fact in the case. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Clemons v. Dougherty County, Georgia*, 684 F.2d 1365 (11th Cir. 1982). In determining whether a movant has met this burden, we review the evidence and all factual inferences therefrom in light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608. All reasonable doubts about the facts are resolved in favor of the non-mavant. *Casey Enterprises v. Am. Hardware Mutual Insurance Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If reasonable minds might differ on the inferences arising from undisputed facts, then a court should deny summary judgment. *Impossible Electronics Techniques, Inc. v.Wackenhut Protective System, Inc.*, 669 F.2d 1026, 1031 (5th Cir. Unit B 1982); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).

Mercantile at 844,

Summary judgment is a useful device, however, if it is not used with caution, it inevitably leads to drastic results. *See Murrell v. Bennett*, 615 F.2d 306, 309 (5th Cir. 1980) Mercantile's burden in responding to the summary judgment motion was to offer significant probative evidence that tended to support its complaint. *See Pan-Islamic Trade Corp. v. Exxon*, 632 F.2d 539, 554 (5th Cir. 1980), cert. denied, 454 U.S. 927, 102 S.Ct. 427, 70 L.Ed.2d 236 (1981) Mercantile met its burden. Because this case should have been remanded to the district court for further development of the record, I must dissent.

Thrasher v. State Farm Fire & Cas., Co., 734 F.2d 637 (11th Cir. 1984)

.1. **Federal Courts**

Order granting summary judgment must be independently reviewed by the Court of Appeals.

.2. **Federal Courts**

In reviewing grant of summary judgment, question is whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c). 28 U.S.C.A.

.3. **Federal Courts**

When examining decision granting or denying summary judgment, Court of Appeals applies same legal standards as those that control district court in determining whether summary judgment is appropriate. Fed.R.Cic.P. 56(c) 28 U.S.C.A.

.4. **Federal Civil Procedure**

Party seeking summary judgment bears burden of demonstrating that no genuine dispute exists as to any material fact in case; when determining whether movant met its burden, courts should review evidence and all factual inferences therefrom in light most favorable to party opposing motion. Fed.R,Civ.P. 56(c),28 U.S.C.A.

.5. **Federal Civil Procedure**

In reviewing motion for summary judgment, all reasonable doubts about facts should be resolved in favor of nonmovant, and if reasonable minds might differ on inferences arising from undisputed facts, then court should deny summary judgment. Fed.R.Civ.P. 56©, 28 U.S.C.A.

Thresher at 638,

Issue

The sole issue before us is whether the district court's order granting summary judgment in favor of State Farm was properly entered.

Discussion

.[1-3] An order granting summary judgment must be independently reviewed by this Court. *Morrison v. Washington County, Alabama*,700 F.2d 678 (11th Cir.

1983). In reviewing the grant of summary judgment, the question is whether any genuine issue of material fact exists. Fed.R.Civ.P. 56(c). When examining a decision granting or denying summary judgment, this court applies the same legal standard as those that control the district court in determining whether summary judgment is appropriate. *Enviromental Defense Fund v. Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).

.[4] The party seeking summary judgment bears the burden of demonstrating that no genuine issue exists as to any material fact in the case. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Clemonds v. Dougherty County, Georgia*, 684 F.2d 1365 (11th Cir. 1982). We, therefore, must determine whether appellee, State Farm, has met its burden.

When determining whether the movant has met its burden, courts should review the evidence and all factual inferences therefrom in a light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608; *Impossible Electronics Techniques, Inc v. Wackenhut Protective System, Inc.*, 669 F.2d 1026 (5th Cir. Unit B 1982).

.[5] Moreover, all reasonable doubts about the facts should be resolved in favor of the nonmovant. *Casey Enterprises v. Am. Hardware Mutual Insurance Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If reasonable minds differ on the inferences arising from undisputed Facts, then a court should deny summary judgment. *Impossible Electronics Techniques, Inc.*, 669 F.2d at 1031; *Croley v. Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).

United States v. Diebold, 369 U.S. 654 (S.Ct. 1962) at 655, On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable

to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the court might be permissible, the materials before the district court having raised a genuine issue as to ultimate facts material to the rule of *International Shoe Co. v. Federal Trade Comm,n.*, it was improper for the district court to decide the applicability of the rule on a motion for summary judgment. Fed.R.Civ.P., 56(c). **Reversed and remanded.**

Haines v. Kerner et al, 404 U.S. 519 (S.Ct. 1971)

Prisoner's **pro se** complaint seeking to recovery damages for claimed physical injuries and deprivation of rights in imposing disciplinary confinement should not have been dismissed without affording his the opportunity to present evidence on his claims. 427 F.2d 71, reversed and remanded.

Haines at 520,

We granted certiorari and appointed counsel to represent petitioner. The only issue before us is petitioner's contention that the district court erred in dismissing his **pro se** complaint without allowing him to present evidence on his claims.

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the **pro se** complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See Dioquardi v. Durning,* 139 F.2d 774 (CA2 1944).

Accordingly, although we intimate no view

on the merits of petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof. The judgment is reversed and the case is remanded for further proceedings consistent herewith.

Reversed and remanded.

Jackson v. Reese, 608 F.2d 159 (5th Cir. 1979)

.1. Federal Civil Procedure

Courts are required to liberally construe pro se complaints, and thus state prisoner's civil rights complaint against State Parole Board should not have been dismissed unless it appeared that he could prove no set of facts which would entitle him to relief.

.2. Constitutional Law

Since state prisoner had not shown a deprivation of a constitutionally protected interest, in that denial of parole did not amount to loss of liberty in the due process context, federal court, in prisoner's civil rights action against State Parole Board, did not need to address whether the board's procedures comported with due process. 42 U.S.C.A. Section 1983; U.S.C.A. Const. Amend. 14.

.[1] The issue presented in this action is whether appellant set fourth specific facts that would, if proved, warrant the relief he sought. It is axiomatic that courts are required to liberally construe pro se complaints. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (5th Cir. 1972) Appellant's complaint should not have been dismissed unless it appeared that he could prove no set of facts which would entitle him to relief. *Conley v. Gibsom*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1958); *accord Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978). We hold that the district court properly dismissed appellant's complaint.

.[2] The threshold question under Section 1983 is whether the complainant has been deprived of a cognizable liberty or property interest. The Supreme

Court has held that the denial of parole, as distinguished from the revocation of parole, does not amount to a loss of liberty in the due process context. (citations omitted) Since appellant has not shown a deprivation of a constitutionally protected interest, this Court need not address whether the Georgia Parole Board's procedures comport with due process, Id. At 1053.

Recusal statute, 28 U.S.C. Section 455(a) and (b), requires mandatory disqualification of judge in any proceeding in which his impartiality might be reasonable be questioned or where he has personal bias or prejudice concerning party. *United States v. Brown,* 539 F.2d 467 (5th Cir. 1976), *citing In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625; *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 444; *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 13. Congress' purpose in amending 28 U.S.C. Section 455 was to reconcile 1972 Code of Judicial Conduct with federal statute and to eliminate dual standards, statutory and ethical, couched in uncertain language that had effect of forcing judge to decide either legal or ethical issue at his peril, and to overrule concept that close cases involving disqualification should be resolved on ground that judge had "duty to sit." *SCA Services, Inc. v. Morgan,* 557 F.2d 110 (7th Cir. 1977). Purpose of enactment of amendments to 28 U.S.C. Section 455 was to adopt categorical rule that would be self-enforcing. *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, (5th Cir. Tex. 1983), quoting *McCuin* at 1265, Other ethical precept's also limit the lawyer's conduct, Canon 9 of the Code of Professional Responsibility provides: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."; 28 U.S.C. Section 144 expressly conditions relief upon filing of timely and legally sufficient affidavit; no such

procedural requirement is contained in 28 U.S.C. Section 455, which is directed to judge, is self-enforcing and places judge sitting on case under duty to recuse himself if he is aware of ground for recusal under Section 455; thus Section 455 modifies Section 144 in requiring judge to go beyond Section 144 affidavit and to consider merits of motion pursuant to Section 455. *United States v. Silba,* 624 F.2d 864 (9th Cir. 1980).

Even if affidavit filed under 28 U.S.C. Section 144 is inadequate, district judge has independent duty to recuse himself under 28 U.S.C. Section 455(a) which is self-executing provision specifying no particular procedure that party must follow; instead, Section 455(a) sets forth mandatory guideline which federal judge must observe sua sponte. *Roberts v. Bailer,* 625 F.2d 125 (6th Cir. 1980). 28 U.S.C. Section 455(a) is broader than 28 U.S.C. Section 144, and applies to any judge and includes proceeding in which his impartiality might be reasonably questioned; Congress enacted revision to 28 U.S.C. Section 455(a) in order to substitute objective test of reasonableness for subjective test of former 28 U.S.C. Section 455, and under broader standard of revised 28 U.S.C. Section 455(a), disqualification is appropriate not only where there is actual or apparent bias or prejudice but also when circumstances are such that judge's impartiality might be reasonably questioned; grounds for disqualification in 28 U.S.C. Section 144 – personal bias or prejudice either against or in favor of any adverse party – are included in 28 U.S.C. Section 455; 28 U.S.C. Section 455(a) allows greater flexibility in determining whether disqualification is warranted in particular situation, *United States v. Ritter,* 540 F.2d 459 (10th Cir. 1976). In determining whether judge should recuse under 28 U.S.C. Section 455(a), issue is not whether judge is impartial in fact, but rather

whether reasonable man might question impartiality under all circumstances. *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979).

Goal of U.S.C. Section 455(a) is to foster appearance of impartiality, and any question of judge's impartiality threatens purity of judicial process; since statute focuses on appearance of impartiality, as opposed to existence in fact of bias or prejudice, judge faced with this potential ground for disqualification ought to consider how his participation in given case looks to average man on street.

If trial judge was required to disqualify himself under 28 U.S.C. Section 455, but did not, Court of Appeals must reverse judgment and order new trial before different judge. *Potashnick v. Port City Constr. Co.*, (5th Cir. 1980), citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652 (1950); *Powell v. Alabama*, 287 U.S. 45, 68, 53 S.Ct. 55,; On appellate review, "abuse of sound judicial discretion" test obtains. *Davis v. Board of School Comrs.*, 517 F.2d 1044; This court, in its opinion, *United States v. Alabama*, 828 F.2d 1532, 1539-41 (11th Cir. 1987) -

.2. Legal Standard

"The guarantee to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." N.20 To ensure that the courts remain above reproach, the Congress passed statutory provisions governing the disqualification of federal judges. The relevant statutes are 28 U.S.C. Sections 144 and 455. N.21 These two statutes control appellants' claim that the lower court erred in failing to disqualify Judge Clemon from presiding over this case. N.22

Alabama at 1540, [3]

Section 455(a) requires a judge to disqualify himself when "his impartiality might be reasonably be questioned." Thus under Section 455(a) an actual demonstrated prejudice need not exist in order for a judge to recuse himself: "disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." Congress expressly intended the amended Section 455 to promote public confidence in the impartiality of the courts by eliminating even the appearance of impropriety, n.30

United States v. Meester, 762 F.2d 867, 884 (11th Cir. 1985)

Thus a motion for disqualification may not ordinarily be based on the judge's rulings in the same case. *United States v. Phillips*, 664 F.2d at 1002-03; *Phillips*, 637 F.2d at 1020. An exception to the general rule that bias must stem from an extrajudicial source exists where "such pervasive and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1051 (5th Cir. 1975)

Potashnick, at 1111, [3]

Clearly, the goal of the judicial disqualification statute is to foster the appearance of impartiality. Cf.E. Thode, Reporter's Notes to Code of Judicial Conduct 60-61 (1973). This overriding concern with appearances, which also prevades the Code of Judicial Conduct and the ABA Code of Professional Responsibility, stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. As this court has noted, "the protection of the integrity and dignity of the

judicial process from any hint or appearance of bias is the palladium of our judicial system." *U.S. v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974). n.8 Any question of a judge's impartiality threatens the purity of the judicial process and its institutions.

[4] Because 28 U.S.C. Section 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality. *Note, Disqualification of Judges and Justices in the Federal Courts.* 86 Harv.L.Rev. 736, 745 (1973)